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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, and CALNEV PIPE-LINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

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Petitioners, the State of California, acting by and through the Department of Transportation and Calnev Pipeline Company, a corporation, hereafter jointly referred to as "Petitioners," pray that a Writ of Certiorari issue to review the judgment and opinion in the above-entitled cause of the United States Court of Appeals for the Ninth Circuit.

The principal respondent herein is Doria Mining and Engineering Corporation, a corporation (hereafter "Doria"). Respondents Cecil D. Andrus, Secretary of the Interior, Douglas Leisz as Regional Director of the United States Forest Service and Harold Mitchell as Acting Forest Supervisor of the San Bernardino National Forest (hereafter, the "federal respondents") were appellees below, but did not join in the Petition

for Rehearing of the Opinion of the Court of Appeals, and have not joined in this Petition. Federal respondents, like Doria, have a continued interest in the outcome of this case by reason of the intervention of the United States in the mining contest proceeding more fully described *infra*.

Opinions and Decisions Below.

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix "A" of this Petition.

The Memorandum of Decision of the District Court for the Central District of California Granting Defendants' Motion for Summary Judgment is reported at 420 F.Supp. 837. A copy of said Decision appears in Appendix "B" of this Petition.

The decision of the United States Department of Interior Board of Land Appeals (hereafter "IBLA") which affirmed the decision of an Administrative Law Judge declaring respondent Doria's 18 unpatented placer mining claims null and void for lack of discoveries of valuable mineral deposits, is reported at 17 IBLA 380-401. A copy of said IBLA decision, with headnotes omitted, appears in Appendix "C" of this Petition.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on November 2, 1979. A timely petition for rehearing filed by Petitioners was denied on December 19, 1979, and this Petition for Certiorari was filed within 90 days of said date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether, in an action for judicial review of an agency decision invalidating mining claims, the alleged newly discovered evidence of fraud on the agency tribunal, *aliunde* the administrative record, but intrinsic to the agency hearing, is sufficient to warrant consideration by the Court where the record as a whole reveals no discovery of valuable minerals was made by locators of the claims.

2. Whether, in the action above-described, considering the administrative record as a whole and disregarding certain evidence in the agency hearing challenged as "tainted," any injustice to a party would result from the denial of a Motion to Amend a Complaint for judicial review to allege newly discovered evidence of fraud *aliunde* the record, where the party's own evidence at the hearing failed to make a showing of discoveries of valuable mineral deposits under the General Mining Law.

Statutes Which the Case Involves.

1. 28 U.S.C. § 1331(a) providing subject matter jurisdiction for the action below, set forth in Appendix "D" hereof.

2. The General Mining Law of May 10, 1872, as amended, in particular 30 U.S.C. §§ 22 and 35, and the Surface Resources Act of July 23, 1955, in particular 30 U.S.C. § 611, all as set forth in Appendix "E" hereof.

3. The Administrative Procedure Act, 5 U.S.C. §§ 701-706 and in particular 5 U.S.C. § 706 set forth in Appendix "F" hereof.

Statement of the Case.

Since 1955 respondent Doria, or its predecessors, claimed possessory interests in eighteen placer mining claims located on federal lands in the Cajon Pass region of the San Bernardino National Forest, San Bernardino County, California.

On or about September 26, 1968, the United States of America recorded a Highway Easement Deed to the State of California which granted to the State an easement over lands covered by the mining claims. Pursuant to such recorded easement, the State entered on portions of land covered by the mining claims and constructed the freeway commonly known as Interstate 15.

On or about January 1, 1961, and again on or about March 27, 1970, the United States Department of Agriculture, Forest Service, issued certain Special Use Permits to Calnev Pipeline Company (Calnev) for the construction of pipelines across portions of such federal lands. In 1970, Calnev, pursuant to such Special Use Permits, entered upon and constructed high pressure pipelines across portions of the mining claims.

Both the easement deed granted to the State and the Special Use Permits granted to Calnev were subject to outstanding valid claims, if any, existing on the dates of the grants. Neither the State nor Calnev obtained permission from Doria or any of its predecessors in interest to enter upon the property upon which the mining claims were located.

Based upon the entries by Petitioners onto lands covered by the mining claims, on or about December 10, 1970, Doria filed suit in the Superior Court of

the State of California for the County of San Bernardino, against Calnev Pipeline Company, for trespass and inverse condemnation in respect to the mining claims. On January 5, 1971, Doria filed a second suit in the Superior Court for San Bernardino County against the State for trespass and inverse condemnation in respect to the mining claims.

In 1972 Petitioners filed private contest No. R-4873 in the Department of Interior pursuant to 43 C.F.R. §§ 4.450-1 *et seq.* asserting interests adverse to Doria in the lands on which the claims were located and alleging that the claims were invalid for failure to discover any valuable mineral deposits within the limits of the claims. Prior to the hearing on said contest, the United States intervened on the side of Petitioners as a contestant. After a six-day hearing all 18 claims were declared null and void by Administrative Law Judge Graydon Holt. Doria appealed the decision to the IBLA and on or about October 31, 1974, the IBLA affirmed the decision (17 IBLA 380-401; Appen. "C" to Petition).

On March 12, 1975, Doria filed its Complaint in the United States District Court, Central District of California, for "Review of Decision Invalidating Mining Claims and For Declaratory Judgment of Validity and For Injunctive Relief." [CR 1-9]. Doria alleged jurisdiction pursuant to 28 U.S.C. § 1331, the Administrative Procedure Act (5 U.S.C. §§ 701-706) and the Declaratory Judgment Act (28 U.S.C. §§ 2200 *et seq.*) [CR 2-3]. In answer to the Complaint, Petitioners denied jurisdiction based on the Declaratory Judgment Act, or on 28 U.S.C. § 1331 [CR 20, lines 9-11; CR 27, lines 3-11]. Petitioners alleged and the district court subsequently held that jurisdiction

was based only on 5 U.S.C. §§ 701-706 (Memorandum of Decision, Exh. "B", p. 1).[1]

On April 28, 1975, Petitioners and the federal respondents moved for Summary Judgment and dismissal of Doria's Complaint on the grounds that the entire administrative record in Contest No. R-4873 supported the IBLA decision declaring Doria's mining claims invalid and that moving parties were entitled as a matter of law to have judgment entered affirming the IBLA decision. A certified copy of the Administrative Record was lodged with the district court as Exh. "A" and decisions of the IBLA and the Administrative Law Judge were attached as Exhs. "B" and "C" [CR 77-145]. Doria's opposition to the motion filed on July 30, 1975, did not establish by affidavits or otherwise any genuine triable issue regarding "improper testing methods and false factual premises" utilized by Petitioners' expert witness Schroter as alleged in Doria's complaint for review. Doria's opposition was based on its Memorandum of Points and Authorities, exhibits, consisting only of copies of the administrative decisions, and the "Records, Files and Transcripts of the Agency Proceedings." In opposition to the summary judgment Doria challenged the propriety of the government's intervention in the private contest, the burden of proof applied at the hearing and the sufficiency of the evidence upon which the IBLA concluded there was no discovery of feldspathic sands [CR 188-237].

After the motion was argued, and submitted for decision, Doria filed on April 26, 1976, a Motion

[1]During pendency of the appeal from the judgment of the district court, this Court held in *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604 (1978), that jurisdiction was conferred by 28 U.S.C. § 1331, and not the Administrative Procedure Act. *Id.* 607 at n. 6.

for Leave to Amend its Complaint on the ground of Doria's "recent discovery" on or about April 1, 1976, that the agency decision was "based on perjured and false testimony" allegedly adduced by Petitioners in the contest hearing. The Affidavits and Memorandum in support of the Motion averred that exhibits in evidence at the hearing showing results of tests run on samples taken from Doria's claims "substantially vary and differ from the actual test sheets prepared by the State laboratory;" that said exhibits materially distorted the actual test results and that the State laboratory in conducting the tests on the samples "failed to comply with standard procedures established by the State for all material testing laboratories." Doria allegedly discovered this asserted misconduct after obtaining copies of all the test sheets showing results of tests run on material from the Doria claims [CR 342, 345-349, 351-353]. The proposed amended complaint generally alleged the discovery of "new evidence" which showed that evidence presented by Petitioners at the hearing was "inaccurate, misleading and false and misrepresented the true facts" and that the IBLA decision was "based on erroneous and false facts and information knowingly introduced into said hearing by defendants." [CR 356].

Petitioners and federal respondents opposed the motion, pointing out *inter alia* that the alleged tainted evidence related to a single exhibit, numbered 14A, which was a compilation of results of tests run on the claims for sand and gravel sufficiency at the request of Petitioners' witness Schroter; that the alleged "newly discovered facts" pertaining to said Exhibit 14A were not new but could readily have been ascertained and delved into at the hearing through cross-examination

of witness Schroter, that Doria had already obtained, through State court discovery, copies of 10 laboratory test sheets as early as November 1, 1975, and that in any event as shown by the affidavit of Mr. Schroter, filed in opposition to Doria's motion, the data in Exhibit 14A accurately reported the results of tests run on the samples as reflected in the original State materials laboratory test sheets [CR 394-398].

After hearing the motion, the district court took the matter under submission [CR 442]. As noted by the Court of Appeals (Appen. "A", p. 5, n.2) the district court stated at the hearing that it did not believe it had jurisdiction to consider matters extrinsic to the administrative record. The district court also stated it was about to circulate its decision on the summary judgment motion, thereby doubting the timeliness of Doria's motion (Rep. Tr. Hrg. of 5-17-76, p. 10).

While Doria's motion to amend was pending Doria filed, on May 27, 1976, another motion to "Supplement the Record" regarding its motion to amend the complaint, or in the alternative, to stay the court proceedings pending Doria's request for a rehearing before the Secretary of Interior. Petitioners and federal respondents moved to strike the motion as violative of the court's earlier ruling that the matter was to stand submitted as of May 28, 1976. The district court vacated the noticed hearing date of the second motion [CR 494].

Thereafter, the district court filed its Memorandum of Decision granting Defendants' Motion for Summary Judgment and entered summary judgment affirming the IBLA decision [CR 505-510]. From said judgment Doria appealed and the Court of Appeals rendered its Opinion vacating the summary judgment and remanding to the District Court. The Court of Appeals considered it necessary only to pass on whether the district court erred in denying, on grounds of lack of jurisdiction, Doria's motion for leave to amend its complaint. The Court held that the district court may consider evidence outside the administrative record in determining whether allegations of a fraud on the agency are meritorious, and remanded for further proceedings, including consideration of the merits of Doria's motion (Opinion, Appen. "A", p. 5).

REASONS FOR GRANTING THE WRIT.

I.

Where the Administrative Record as a Whole Clearly Supports the Agency Decision and Where the Alleged Fraud as to Which Judicial Review Is Sought Does Not Reach the Core of a Case nor the Agency Decision, Review Should Be Denied in the Interest of Finality of Decisions and Avoidance of Trials De Novo in the District Courts.

The decision of the Court of Appeals involves an important question regarding the scope of judicial review of an agency ruling. The Court holds it was error for the district court to deny, for lack of jurisdiction, Doria's Motion for Leave to Amend Its Complaint to show alleged fraud (Opinion, Appen. "A", p. 8). The Court of Appeals' rationale is that alleged newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the record and that the district court "may consider evidence extrinsic to the record in determining whether such allegations are meritorious." (Opinion, Appen. "A", p. 5). This conclusion is reached without considering whether from the record as a whole, the alleged tainted evidence really went to the core of the case or would have made any difference in result. In this respect, Petitioners submit that the holding will seriously undermine, if not efface, the well settled rule that the proper standard of judicial review of agency action is whether the agency findings are supported by substantial evidence in the record as a whole. 5 U.S.C. § 706(2)(E); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-491 (1951); *Multiple Use Inc. v. Morton* (9th Cir. 1974) 504 F.2d 448, 452.

The Court of Appeals concededly found no direct authority for its holding, but cited the case of *Standard Oil Co. v. Montedison, SpA* (3d Cir. 1976) 540 F.2d 611 as "instructive." In *Montedison*, a patent interference case in which the plaintiff sought judicial review under 35 U.S.C. § 146 and raised for the first time an issue of fraud in the interference proceeding, the Third Circuit did hold that the district court "in appropriate circumstances . . . may, in such an action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding. . . " *Id* at 617. However, the court further stated in *Montedison* that a district court should not permit the issue to be raised for the first time unless ". . . manifest injustice to the parties and the public will otherwise result. . ." *Id* at 617.

In the case at bench, Petitioners submit that on the record below the Court of Appeals has improvidently tipped the scales in favor of Doria in its concern over "preventing the prejudice to Doria . . . which arises out of circumstances such as those before us [which in the opinion of the Court outweighed] any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions. . . ." (Opinion, Appen. "A", p. 8). Citing by analogy the collateral estoppel doctrine, the Court of Appeals further stated that the advantages of finality can only be enjoyed when the aggrieved party has had an adequate opportunity to litigate his claim.

Petitioners submit that as the administrative record herein amply shows, Doria had precisely that opportunity in the presentation of its evidence in the mining

contest. See Summary of Testimony of Doria's seven witnesses at the hearing, Appen. "C", pp. 29-33, [17 IBLA at 392-395]. The alleged fraud which was the basis both of Doria's Motion to Amend and subsequent Motion for Relief Under *Federal Rules of Civil Procedure* 60(b)(3) was clearly intrinsic to the administrative proceeding.[2] It involved solely the reliability of results of tests run on samples taken from the claims by Schroter's crew. Those results, now considered so crucial by Doria, were certainly not accepted at face value by Doria as evidenced by the number of witnesses who testified on Doria's behalf, contrary to Schroter's opinions.

In another case cited by Court of Appeals below, *Interstate Investors, Inc. v. United States*, 287 F.Supp. 374 (S.D.N.Y. 1968), a three judge court decided the merits of a claim to set aside an agency decision for alleged fraud. However, the Court was guided by the following principle therein:

> "Plainly the fact that false or misleading testimony was given during the course of a judicial proceeding does not constitute a fraud upon the court unless it appears that the court was so misled by such testimony as to render a decision based on a mistaken view of the material facts. [Citations] This is of course equally true in an administrative proceeding."
>
> 287 F.Supp. at 382.

[2]The alleged "fraud", if indeed it existed, could easily have been uncovered or probed at the hearing had Doria's counsel desired to pursue on cross-examination the basis of contestants' Exh. 14A which tabulated the test results of samples taken from the claims. In a mining contest, as in any adversary proceeding, a party does not accept adverse evidence because of the supposed "integrity" of an assay or testing laboratory. Nor does an adverse party allow unfounded conclusions by another side's experts. The factual bases of an adversary expert's opinion must, of course, be probed and questioned. If, years after the hearing in a collateral proceeding, it turns out that the evidence was not as solid as it appeared at the hearing, it is too late to rebut it. Under the rubric of "Newly Discovered Evidence of Fraud," this was precisely Doria's tactic in the district court.

In the instant case, the testimony in the administrative hearing as thoroughly reviewed in the IBLA decision, clearly shows that neither the administrative law judge nor the IBLA was so influenced by the results of a single set of tests run on the Doria samples as to render the decision nullifying the claims a miscarriage of justice predicated on a mistaken view of material facts. Regardless of results of tests on the claims, the administrative law judge after reviewing *all* the evidence stated in his decision,

> "The use of material on the claims as of July 1955 for aggregate required a plant or some other means of screening, washing and grading. Although there was water [giving Doria the benefit of the doubt on this point], it had not been developed, there was no processing plant, and the only potential market was the State of California. The State constructed roads across the claims during the two periods but used material from a different area. This falls far short of establishing that there was a market for the sand and gravel on any one of the claims or on the claims as a group on the date that common varieties of sand and gravel were excluded from location. . . ." [CR 40].

Similarly, after its comprehensive review of testimony and exhibits adduced by both sides, the IBLA con-

cluded with respect to the sand and gravel deposits as follows:

> "The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market for the period 1955 to the hearing. During that period deposits of superior quality were actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. (Citation) It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. (Citation)".
>
> (Appen. "C", 17 IBLA at 396).

The fraud issue raised by respondent Doria below was relevant only to the *quality* of materials on the claims for use in building materials. However, as is established by decisions involving sand and gravel locations, the quality of materials on the claims is but one factor in establishing a discovery of valuable mineral deposits. See *Clear Gravel Enterprises, Inc. v. Keil* (9th Cir. 1974) 505 F.2d 180. Other factors which were addressed in depth by the IBLA decision, and found wanting in the Doria claims, are: accessibility of the deposit, its proximity to the relevant markets, the demand for the specific materials on the claims and the locator's bona fide efforts, or lack thereof,

to develop the claims and ability to compete profitably in the market with a product extracted from the claims. In this regard, the following language in the case of *Humboldt Placer Mining Co. v. Sec'y of the Dept. of Interior* (9th Cir. 1977) 549 F.2d 622, in which the court quoted approvingly from an IBLA decision affirming the invalidity of certain placer mining claims located for sand and gravel is particularly applicable herein:

> ". . . Here there was no positive evidence of marketability to overcome the government's prima facie case. Further the determination of the IBLA that the government had made out a prima facie case of lack of discovery was supported by testimony disparaging the quality of the gravel on the claims."
>
> 549 F.2d at 625-626.

In the case at bench there was ample testimony from other witnesses, independent of the challenged test results evidenced by Exh. 14A, that the quality of the Doria deposits was inferior compared with that of established aggregate producers in the San Bernardino and Victorville market areas. See IBLA opinion reviewing the testimony of Messrs. Thwing, Hove and Curtin (Appen. "C", pp. 27-29) [17 IBLA at 391-392]. Indeed, Doria's own expert, Mr. Longfield, characterized the quality of the Doria material as marginal at best and insufficient in and of itself to sustain a mine (Record, Adm. Hrg. 1222, 1241). The foregoing portions of the record independently supported the IBLA decision. The opinion of the Court of Appeals remanding the case to hear the alleged fraud issue thus not only undermines the substantial evidence rule, but is wasteful and unncessary in light of the record presented herein.

II.

Where the Alleged Tainted Evidence Does Not Go to the Core of a Mining Contest and Where Other Evidence in the Record Amply Supports the Agency Decision, the Integrity of the Process Is Not so Compromised as to Require a Hearing on Charges of Fraud.

Understandably, the cases reaching this Court in which the integrity of the record below has been challenged have been very limited in number. In such cases this Court quite properly declined to review the record and remanded the matter to the lower court to determine where the truth lay. *E.g., United States v. Shotwell Manufacturing Co.,* 355 U.S. 233 (1957); *Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115 (1956). In one exceptional case the long-standing, deliberately contrived fraud was so egregious as to call for the equitable remedy of vacating the fruits of a judgment obtained by the fraud long after its perpetration on the governmental agency and the courts. *Hazel-Altas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238 (1944).

In full awareness both of the seriousness of charges of fraud and of this Court's meticulous standards in supervision of lower court proceedings to assure that justice is fairly administered, Petitioners submit the record herein does not fall within the category of the cases above-cited. Rather, this is a case where a single set of test results embodied in a single document and introduced in the course of examination of an adversary expert is challenged years later on the basis of alleged after-discovered irregularities. This is not a case where the alleged tainted testimony was so contrived, so egregious or so pervasive in the record as to amount to a fraud on the adjudicatory agency.

Wholly apart from the test results evidenced by Schroter's Exhibit 14A, Petitioners established more than a *prima facie* case that the Doria deposits were of inferior quality. Witness Thwing, a consultant and former president of Triangle Rock products, concluded after his study which included results of tests in addition to those represented by Exhibit 14A, that the optimum use of the Doria deposits would be for low-grade fill material (Record, Adm. Hrg. 330, 345-46, 362, 380). Mr. Curtin of Owl Rock Products was of the opinion, even after taking samples and entering into a short-lived option with Doria, that the claims could not have supported a continuous commercial aggregate mine because the quality of material was poor and the relevant market adequately served by other producers (Record, Adm. Hrg. 457-458). At Doria's request Mr. Hove, operator of a concrete batch plant, also took samples from the claims and test results likewise indicated the material was substandard for commercial use (Record, Adm. Hrg. 482).

Further, as evidenced by the IBLA decision, Doria itself, notwithstanding its array of witnesses, failed to adduce convincing evidence to sustain its burden of proof that material on the claims was marketable at a profit either for sand and gravel or feldspathic sands. As stated under Point I, *supra,* proof of discovery of valuable minerals requires more than a showing of quality of the deposit involved. As appears from the IBLA decision, there was not a shred of evidence of any commercial demand for the sand and gravel deposits, or that material was removed from the claims for use in high grade concrete aggregate. Accordingly, as in *Humboldt Placer Mining Co. v. Sec'y of the Dept. of Interior, supra,* 549 F.2d 622, 625, the IBLA con-

cluded there was no positive evidence of marketability to overcome the contestants' *prima facie* case of invalidity [17 IBLA 380, 396]. The lack of sales of material from the Doria claims during the long years in which they lay dormant was certainly relevant to the issue of marketability. In the absence of a demand and marketability of the Doria deposits at a profit, the claims were properly declared null and void regardless of the results of tests run on samples. The importance of showing marketability at a profit in respect to mining claims was emphasized by this Court in the landmark decision of *United States v. Coleman,* 390 U.S. 599, 602 (1968), which approved the marketability requirement as a complement to the traditional "prudent man" test.

On the foregoing record, the Court of Appeals' reversal of summary judgment in favor of Petitioners and remand of the case to the district court was erroneous absent consideration of whether the alleged tainted testimony affected the decisions below or would have made any difference in result viewing the record as a whole. Resting its decision on a narrow jurisdictional ground, the Court of Appeals declined to consider this aspect of the case. Such disposition as was made herein, will encourage attacks on agency decisions in derogation of the limited scope of judicial review and will open the door to now proscribed *de novo* trials by the simple expedient of alleging fraud. Even under the narrow holding of the Court of Appeals, such expedient will involve examination of matters extrinsic to the record thereby giving the aggrieved party the equivalent of a *de novo* trial ostensibly to determine if the agency decision was "infected" with fraud. This result is wasteful, unnecessary and unfair in a case,

such as the one at bench, where ample evidence, independent of the alleged tainted testimony, exists to support the agency decision under settled principles of mining law.

Conclusion.

An aggrieved party's attack on an agency decision based on matters extrinsic to the administrative record, but intrinsic to the hearing, such as alleged perjured testimony, does not *ipso facto* require an inquiry into the merits of the charges. The Court should determine from a review of the entire record whether the alleged tainted evidence went to the core of the agency decision. If, as in the instant case, it did not and the decision is otherwise well supported by substantial evidence, continued litigation is needless and constitutes an unwarranted burden on the courts.

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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January 22, 1980.

Appendix "A".

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Doria Mining and Engineering Corporation, a corporation, Plaintiff-Appellant, vs. Rogers Morton, Secretary of the Interior, Calnev Pipeline Company a corporation, the State of California, Douglas Leisz, as Regional Director of United States Forest Service, and Harold Mitchell, as Acting Forest Supervisor of San Bernardino National Forest, Defendants-Appellees. No. 77-1163.

Appeal from the United States District Court For the Central District of California.

Filed: Nov. 2, 1979.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

WALLACE, Circuit Judge:

Doria Mining and Engineering Corporation (Doria) appeals from a summary judgment in which the district court affirmed an administrative decision by the Department of the Interior Board of Land Appeals (IBLA) regarding the validity of various placer mining claims. Among other things, Doria alleged that the IBLA decision was obtained by fraud and perjury, but the district court would not consider this allegation because it was based on evidence not found in the administrative record. We vacate the summary judgment and remand to the district court.

I

Doria has asserted a possessory interest in 18 placer claims (for the discovery of valuable sand and gravel deposits) which had been obtained from the United States

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*Honorable Gus J. Solomon, United States Circuit Judge, District of Oregon, sitting by designation.

Forest Service by Doria's predecessors in interest. The Forest Service granted to the State of California an easement across portions of land covered by Doria's purported claims, on which California subsequently built part of Interstate Highway 15. The Forest Service also granted special use permits to Calnev Pipeline Company (Calnev), which enabled it to construct a pipeline across land covered by Doria's claims. Both the easement and the permits were issued "subject to existing claims," but neither California nor Calnev sought permission from Doria before engaging in their construction projects. In 1970 and 1971, Doria filed actions against California and Calnev in California superior court alleging trespass and inverse condemnation.

In 1972, California and Calnev initiated private contest proceedings in the Department of the Interior pursuant to 43 C.F.R. § 4.450-1, claiming interests adverse to Doria's in the lands on which Doria's purported placer claims were located, and alleging that the claims were invalid for failure to discover a valuable mineral deposit within their limits. The United States subsequently intervened as a contestant on behalf of the Forest Service. Following a hearing, an administrative law judge ruled that the claims were invalid, and, on appeal, the IBLA affirmed.

Doria requested reconsideration of the IBLA judgment, based on "suspicions" that the contestants' primary expert witness, Schroter, had fraudulently altered mineral samples from Doria's claims, and had perjured himself in testifying about his sampling and testing methods. Upon denial of the request, Doria filed a complaint in district court pursuant to 28 U.S.C. § 1331(a) and portions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06,[1] for judicial review of

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[1]Subsequent to Doria's filing of its complaint, the Supreme Court held that jurisdiction to review administrative decisions by the Secretary of the Interior is conferred on the district court by section 1331, and not by the Administrative Procedure Act. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978).

the IBLA judgment. Based upon the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, Doria also requested a judgment declaring that its placer claims were legal and valid. The complaint did not allege that Schroter had committed either fraud or perjury before the IBLA.

Doria claims that thirteen months after commencing its district court review action, it discovered in the collateral state proceedings what it believed was strong evidence of fraud and perjury by Schroter in the IBLA proceeding. Doria asserts that it immediately moved the district court for leave to amend its complaint to include allegations of such misconduct. The district judge took the motion under submission.

One month later, Doria renewed its motion for leave to amend and, in the alternative, moved for a stay of the district court proceedings pending an attempt to obtain a rehearing before the IBLA based on the purported new evidence. Both motions were denied, and the district judge subsequently granted summary judgment affirming the IBLA decision. Doria then moved for, and the district judge summarily denied, relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b)(3).

Doria raises three issues on appeal: (1) whether the district court erred in denying, on jurisdictional grounds, Doria's motion for leave to amend its complaint or, in the alternative, for a stay of proceedings; (2) whether Doria's allegations of fraud and perjury raised factual issues that made the district court's subsequent granting of summary judgment improper; and (3) whether the district judge's summary denial of Doria's Rule 60(b)(3) motion constituted an abuse of discretion. We find it necessary to consider only the first issue.

II

The district courts have jurisdiction to review administrative decisions of the Secretary of the Interior pursuant to 28 U.S.C. § 1331(a). *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978). When the regulations governing an administrative decision-making body require that a party exhaust its administrative remedies prior to seeking judicial review, the party must do so before the administrative decision may be considered final and the district court may properly assume jurisdiction. *Eluska v. Andrus*, 587 F.2d 996, 999 (9th Cir. 1978); *Montgomery v. Rumsfeld*, 572 F.2d 250, 252-53 (9th Cir. 1978); *see* 5 U.S.C. § 704.

Department of Interior regulations do require that administrative remedies must be exhausted before any administrative decision from the Department is subject to judicial review. 43 C.F.R. § 4.21(b). Administrative remedies are deemed exhausted upon disposition of a claim which is not appealable to either the Director of the Interior Office of Hearings and Appeals or an Appeals Board such as the IBLA. *Id.* § 4.21(b). A decision of the IBLA is not subject to further appeal before either the Director or any Appeals Board. *Id.* § 4.21(c). When Doria lost before the IBLA, therefore, it had exhausted its administrative remedies, and the IBLA determination constituted the Secretary of the Interior's final decision to deny the validity of Doria's purported placer mining claims. The district court thus had jurisdiction to review the IBLA judgment.

III

The district court, however, denied Doria's motion for leave to amend, apparently on the ground that the court was without jurisdiction to consider evidence not found in the

administrative record.[2] It is true that the appropriate standard for review of administrative proceedings is whether the administrative findings are supported by substantial evidence in the record as a whole. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91, 493, 497 (1951); 5 U.S.C. § 706. When, however, the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the administrative proceeding, we hold that the reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious.

Although no case was cited to us, and we have found no case which is direct authority for our conclusion, *Standard Oil Co. v. Montedison, S.P.A.*, 540 F.2d 611 (3d Cir. 1976), is instructive. In that case, the plaintiffs had filed, pursuant to 35 U.S.C. § 146, for district court review of a decision by the Board of Patent Interferences (Board). They later sought leave from the district court to amend their complaint to include allegations of fraud in the proceedings before the Board. Believing that it was not empowered to consider an issue that had not been raised before

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[2]The exact language of the district judge, in colloquy with counsel, was as follows:

> THE COURT: No, I think that I will take your matter to amend under submission . . ., but I just don't think I have jurisdiction. You are attacking the matter collaterally. You can't do it.
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> . . . .
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> THE COURT: If somebody has perjured himself, why don't you refer it to the United States Attorney?
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> . . . .
>
> THE COURT: To the criminal section.
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> . . . .
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> THE COURT: I will take it under submission but I just don't think I have any more right to interfere with — in this kind of a basis than I would have the right to interfere in a State Court trial proceeding.

The district judge ultimately denied Doria's motion without comment, and without giving Doria an opportunity to develop the motion's evidentiary foundation.

the Board, the district court denied the plaintiffs' motion to amend. *Id.* at 618. On appeal, the Third Circuit held that "in appropriate circumstances the district court may, in [a section 146] action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding." *Id.* at 617. The court enumerated a number of factors which the district court should consider when deciding whether to exercise discretion to hear new allegations of fraud,[3] and then stated: "If after considering all relevant factors the court concludes that manifest injustice to the parties and the public will otherwise result, it should permit the issue to be raised for the first time in the § 146 proceeding." *Id.*

Montedison's holding that a court reviewing an administrative determination may properly exercise its discretion to hear an issue of fraud not presented before the administrative body, and hence not found in the administrative record, finds some support in earlier cases. *See Interstate Investors, Inc. v. United States,* 287 F. Supp. 374, 382-84 (S.D.N.Y. 1968) (three-judge court) (court reached the merits of complaint seeking to set aside an adminstrative decision for fraud, based on evidence not contained in the administrative record), *aff'd,* 393 U.S. 479 (1969) (per curiam); *cf. United States v. Shotwell Mfg. Co.,* 355 U.S. 233, 240-45 (1957) (allegation that new evidence had been discovered showing fraud had been committed on the district court; Supreme Court considered such evidence in deciding that vacation and remand were required). *See also Linn and*

[3]These factors include: (1) whether there was "suppression, bad faith, or gross negligence on the part of the plaintiff in failing to raise the issue of fraud before the Board"; (2) whether evidence of the alleged fraud was "reasonably available" at the time the dispute was before the Board; and (3) whether the issue "has been or may be more conveniently and expeditiously raised in another" forum. 540 F.2d at 617.

Lane Timber Co. v. United States, 236 U.S. 574, 578-79 (1915) (a decision by the Secretary of Interior to issue land patents is open to reconsideration by the courts when the issuance has been obtained by fraud.[4]

Although the circumstances of *Montedison* are not identical to those of this case,[5] the rationale of that case—that in certain circumstances a court reviewing an administrative decision should hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice—is equally applicable here. Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment. This is precisely what hap-

[4]*But see Iron Ore Co. of Canada v. Dow Chem. Co.,* 177 U.S.P.Q. 34, 43-44 (D. Utah 1972) (district court indicated that, generally, it need not consider a newly raised issue in a section 146 proceeding), *aff'd on other grounds,* 500 F.2d 189 (10th Cir. 1974). *See also Standard Oil Co. v. Montedison S.p.A.,* 540 F.2d 611, 616 n.10 (3d Cir. 1976), (finding *Iron Ore Co.* unpersuasive authority on question whether new issue of fraud may be raised before reviewing court).

[5]An action taken in district court pursuant to 35 U.S.C. § 146 is procedurally a trial *de novo,* whereas judicial review of an IBLA judgment is not. The court in *Montedison,* however, observed that a section 146 review proceeding "is ordinarily subject to the general rule of estoppel applicable to proceedings for the review of administrative agency actions that consideration of issues ancillary to priority is limited to those issues which have been raised before the Board in the interference proceeding." *Standard Oil Co. v. Montedison S.p.A., supra,* 540 F.2d at 616 (footnote omitted). Insofar as allegations of fraud extrinsic to the administrative record are concerned, then, district court review of administrative proceedings, pursuant to section 146, is, as viewed by *Montedison,* indistinguishable from judicial review of IBLA proceedings.

pened to Doria.[6] We conclude that the importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us outweighs any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions. *Cf. Nasem v. Brown*, 595 F.2d 801, 806-07 (D.C. Cir. 1979) (consideration of applicability of collateral estoppel doctrine; court states that doctrine represents balance of needs of judicial finality and efficiency as against need for fairness and accuracy, and concludes that "[t]he advantages of finality . . . can only be fairly garnered when the party to be estopped has had an adequate opportunity to litigate his claims" *id.* at 806).

We thus hold that it was error for the district court to deny, for lack of jurisdiction, Doria's motion for leave to amend its complaint. Because we do not know how the district judge would have ruled on the motion had he believed he had jurisdiction, we vacate the summary judgment

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[6]During oral argument, the government contended that the proper forum for consideration of Doria's new evidence of alleged fraud and perjury was the Department of the Interior. The record, however, suggests that, as a matter of policy, the Department of the Interior refuses to grant requests for reconsideration of an administrative determination when the decision is before the district court for review. This was the Department's reason for denying Doria's first request for reconsideration, and the government itself stated during oral argument that it was also the basis for denying Doria's second request for reconsideration, made while this appeal was pending. In view of this apparent policy, it is at best questionable whether the proper forum for Doria to present its allegations of fraud rests in the Department of the Interior. In any case, this would not appear to implicate the jurisdiction of a reviewing district court to consider such evidence, because the Department does not require that a party's exhaustion of its administrative remedies prior to seeking judicial review include a request for reconsideration of the administrative decision. 43 C.F.R. § 4.21(c).

affirming the IBLA decision.[7] We remand to the district court for further proceedings consistent with this opinion, including consideration of the merits of Doria's motion.[8]

VACATED AND REMANDED.

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[7]It is thus unnecessary to decide whether the district court erred in granting summary judgment in the face of Doria's allegations of fraud and perjury.

[8]Because, in arguing the merits of its motion, Doria will have an opportunity to present to the district court its new evidence of alleged fraud and perjury, we also find it unnecessary to consider Doria's suggestion that the district court erred when it refused to consider the new evidence in connection with Doria's Rule 60(b)(3) motion.

APPENDIX "B".

Memorandum of Decision Granting Defendants' Motion for Summary Judgment.

United States District Court, Central District of California.

Doria Mining and Engineering Corporation, a Corporation, Plaintiff, v. Rogers Morton, Secretary of the Interior, Calnev Pipeline Company, etc., et al., Defendants. No. CV 75-899-FW.

Filed: Sept. 28, 1976.

In this action Plaintiff appeals from the decisi : of the Interior Board of Land Appeals (hereinafter the Board) declaring Plaintiff's placer mine claims invalid. Jurisdiction is based upon 5 U.S.C. §§701-706.

Plaintiff asserts a possessory interest in eighteen unpatented placer mining claims located within the San Bernardino National Forest.

On or about September 26, 1968, the United States Forest Service duly issued a highway easement to the State of California, and pursuant thereto, the State of California, without obtaining permission from the Plaintiff, constructed a portion of State Highway 15 across a portion of said claims.

In January, 1961, and March, 1970, the United States Forest Service duly issued Special Use Permits to Calnev Pipeline Company (hereinafter Calnev) and pursuant thereto, Calnev constructed pipelines across portions of the aforementioned mining claims without obtaining permission from Plaintiff.

The easement to the State and the Special Use Permits issued to Calnev were issued by the United States Forest Service subject to all existing valid claims on said United States Forest lands.

On or about December 30, 1970, Plaintiff filed suit in the Superior Court of San Bernardino County, California, Action No. 152480, against Calnev for trespass and inverse condemnation of said unpatented claims. On January 5, 1971, Plaintiff filed a second suit in Superior Court for San Bernardino County, California, Action No. 152504, against The People of the State of California for trespass and inverse condemnation because of the highway construction over and across a portion of said claims.

Thereafter in July, 1972, Calnev and the State of California initiated private contest No. R-4873 under 43 C.F.R. 4-450-1 et seq., in the United States Department of the Interior claiming an interest adverse to Plaintiff in said lands. The Contest Complaint charged that the eighteen purported placer mining claims of Plaintiff were invalid for lack of discovery of a valuable mineral deposit within the limits of any of the claims. In January, 1973, the United States of America intervened in behalf of the United States Forest Service. Following a hearing in the United States Department of the Interior, Office of Hearings & Appeals, Hearings Division, the Administrative Law Judge declared each and all of said claims null and void. The contestees took a timely appeal to the Interior Board of Land Appeals which declared all eighteen claims null and void. Plaintiff is now appealing the decision of the Interior Board of Land Appeals.

An appeal from a decision of the Interior Board of Land Appeals does not entitle the Plaintiff to a trial de novo on the facts, but rather only to a determination that the Board's decision is supported by substantial evidence considering the record as a whole. *Multiple Use, Inc. v. Morton,* 504 F.2d 448 (9th Cir. 1974).

In examining the record before the Court, the evidence shows that the tests conducted by the government's expert,

Mr. Austin Schroter, demonstrated the invalidity of the claims under either the marketability or the "prudent-man" man test. *United States v. Coleman,* 390 U.S. 599 (1968).

The tests showed there were no valuable mineral deposits in the area of Plaintiff's claims and that the sand and gravel present in the area did not satisfy specifications required for commercial aggregate, or common variety minerals, as of July 23, 1955, the date of the Surface Use Act which withdrew common variety minerals from location under the mining laws. 30 U.S.C. §611. Plaintiff is therefore limited to discoveries of noncommon or valuable minerals.

It appears that once the highway easement grant and Special Use Permits were made, they had the effect of withdrawing the areas covered thereby from mineral entries to the extent necessary for the Interstate highway and the pipeline, and precluded mineral entries incompatible therewith. See 1 *American Law of Mining* §2.85.

A mining claimant on withdrawn land must show discovery of a valuable mineral deposit before the withdrawal, since the right to prospect for minerals ceases on the date of withdrawal. *United States v. Pulliam,* 1 IBLA 143 (1970); see *Lockhart v. Johnson,* 181 U.S. 516, 520 (1901).

The mining claims involved herein remained open to subsequent valuable mineral location subject however to the grants of right of way and the Special Use Permits to the State of California and Calnev.

With regard to Plaintiff's discovery of noncommon variety minerals, it appears from the testimony of Plaintiff's own witnesses that its examination and testing of materials for feldspathic sand (which the Board assumed to be noncommon variety) was preliminary and exploratory suggesting prospecting and not development which is required to meet the "prudent-man" test. *Barton v. Morton,* 498 F.2d 288 (9th Cir. 1974).

A valid claim requires more of an evidentiary showing than finding that further exploration might be warranted. *Multiple Use, Inc. v. Morton, supra.*

"If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." *United States v. Zeweifel,* 508 F.2d 1150, 1156 (10th Cir. 1975).

Plaintiff also alleges procedural errors which it claims resulted in a denial of due process. The alleged errors involve the government's intervention in the proceeding initiated by the State of California and Calnev.

Plaintiff contends that 43 C.F.R. §4.451-1 only permits the United States to initiate proceedings, not to intervene in pending proceedings. While there is no case on point regarding intervention of the United States, intervention by the Bureau of Land Management seems clearly contemplated. It is provided in 43 C.F.R. §4.452-5 that "the contestant will then present his case following which the other parties (and in private contests the Bureau, if it intervenes) will present their cases." It appears by analogy that the United States should have the authority to intervene herein.

Plaintiff also alleges that the notice it received was insufficient under 43 C.F.R. §4.451-1. However, the Court finds the notice was sufficient to apprise Plaintiff that the United States was adopting the private contestants' claims.

Plaintiff asserts that the intervention of the United States shifted the burden of proof to the Plaintiff, and that this was improper. It should be noted, however, that in the decision of Administrative Law Judge Holt there is no ruling on the burden of proof. Moreover, the Board in its review of Judge Holt's decision stated that "regardless of which party the

Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims.'' 17 IBLA 389.

Plaintiff's last claim of procedural error, that it should have been notified prior to the hearing that the burden of proof had shifted, also appears to be without merit in view of the number of witnesses it introduced. Plaintiff seemed fully prepared to assume the burden of proof.

Based on the foregoing, the Court finds that Plaintiff had a full hearing and an ample opportunity to present evidence, and that there was no denial of due process. Furthermore, it appears that the decision of the Board was supported by substantial evidence.

The foregoing constitutes the summary of undisputed material facts and conclusions of law of the Court. No judgment shall be entered until the Court has signed its formal judgment.

DATED this 28 day of September, 1976.

/s/ Francis C. Whelan
FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE.

APPENDIX "C".

United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203.

State of California, et al. v. Doria Mining and Engineering Corporation, et al., United States, Intervenor. IBLA 74-192.

Decided: October 31, 1974.

Appeal from decision of Administrative Law Judge Graydon E. Holt (California Contest No. R-4873) declaring mining claims null and void.

Affirmed.

APPEARANCES: Joseph A. Montoya, Esq., Robert L. Meyer, Esq., Hugh R. Williams, Esq., and Robert W. Vidor, Esq., Legal Division, Department of Public Works, Los Angeles,[1] for appellee State of California; David G. Moore, Esq., Reid, Babbage & Coil, Riverside, California, for appellee Calnev Pipe Line Company; Milnor E. Gleaves, Esq., Los Angeles, California, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for the United States, Intervenor.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Doria Mining and Engineering Corporation, Richard H. Hutchinson, J. J. Schwietert and E. May Schwietert have appealed from a decision by Administrative Law Judge Graydon E. Holt, dated December 26, 1973, declaring ap-

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[1]On June 25, 1973, the parties were given notice that pursuant to CAL. GOV'T CODE §14008, the Department of Transportation succeeded to all the duties, powers, purposes, responsibilities and jurisdiction of the Department of Public Works, State of California, effective July 1, 1973, and effective that date assumed the position of said Department of Public Works as contestant in these proceedings. Counsel of record remained the same.

pellants' eighteen 40-acre association placer mining claims null and void.

Appellants' mining claims were located between March 1, 1953, and July 22, 1955.[2] The claims are situated in Cajon Pass approximately halfway between Victorville and San Bernardino, and lie within the San Bernardino National Forest in secs. 14 and 23, T. 3 N., R. 6 W., S.B.M., California.

Appellee State of California claims an interest in sections 14 and 23 by virtue of a Highway Easement Deed issued by the United States on September 26, 1968.[3] Between 1968 and 1970, the State entered upon portions of sections 14 and 23 and constructed a highway commonly known as Interstate 15. This highway crosses over some of appellants' mining claims. The State's easement is subject to:

> (1) Outstanding valid claims, if any, existing on the date of this grant, and the Grantee shall obtain such permission as may be necessary on account of any such claims. [Ex. 1]

Appellee Calnev Pipe Line Company is a corporation engaged in the construction, maintenance and operation of pipeline systems for the purpose of transporting liquids. On January 1, 1961, and March 27, 1970, the United States Department of Agriculture, Forest Service, issued Special Use Permits to Calnev for the construction of pipelines across portions of sections 14 and 23. In 1961, Calnev entered upon these sections and constructed a high pressure pipeline. In 1970, Calnev again entered the area and constructed another high pressure pipeline. The pipelines cross

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[2]See Appendix A.

[3]The right-of-way was granted by the Department of Transportation under the authority of the Federal Aid Highway Act of August 27, 1958, *as amended*, 23 U.S.C. §107(d) (1970). The Department of Agriculture, acting by and through the Forest Service, agreed to the transfer of the easement through the San Bernardino National Forest.

over portions of appellants' mining claims. Calnev's permits were "subject to all valid claims" (Exs. 2a, 2b).

On December 30, 1970, and January 5, 1971, appellants filed in the Superior Court of San Bernardino County complaints in inverse condemnation and trespass against Calnev and the State of California. In their complaints appellants alleged: (a) ownership of the 18 unpatented placer mining claims; (b) that Calnev and the State, in construction of the above-mentioned improvements, entered upon and took permanent possession of portions of land covered by the mining claims without permission and authority of appellants; (c) that the lands embraced within said mining claims contain valuable deposits of sand, gravel and precious metals; (d) that by reason of the construction and maintenance of the improvements, extraction of sand, gravel and precious metals within the area of the Easement Deed and Special Use Permits has been rendered impossible; and (e) extraction of minerals has been rendered practically and economically unfeasible upon remaining portions of the mining claims. Appellants prayed for damages against Calnev and the State in excess of $15,000,000.

On July 20, 1972, appellees initiated a private contest against appellants pursuant to 43 CFR 4.450. Appellees claimed that by virtue of the easement and permits noted above they were competing users, and claimed an interest adverse to appellants' interests in the lands embraced within the mining claims. Their complaint maintained that appellants' mining claims were invalid for the following reasons:

> (a) There is not disclosed within the boundaries of said mining claims, and each of them, mineral materials of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery;
>
> (b) The materials found within said mining claims, and each of them, could not have been mined, removed

and marketed at a profit prior to the Act of July 23, 1955; and

(c) The land embraced within said mining claims, and each of them, is non-mineral in character.

Appellants filed an answer to the complaint stating that the 18 placer mining claims were valid. Appellants also filed a motion to dismiss the contest alleging that the contestants lacked standing to bring the action under the private contest provision cited above because neither the easement nor the permits created an interest "adverse" to the interests of the contestees. Judge Holt denied appellants' motion to dismiss.

On January 15, 1973, Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, filed a notice of appearance on behalf of the United States requesting the right to intervene in the capacity of a contestant. The request was based on the Forest Service's determination that the proceedings directly concerned the status of land comprising a portion of the San Bernardino National Forest. Judge Holt granted the motion for intervention. Appellants' motion to set aside the order allowing intervention by the United States was denied. Thereafter, a hearing was held in Los Angeles, California, beginning on April 26, 1973.

The issues at the hearing narrowed to the questions of (a) whether there was a discovery of a valuable sand and gravel deposit on each claim as of July 23, 1955, and without substantial interruption up to the time of the hearing, and (b) whether there was a discovery of a valuable deposit of feldspathic sand usable for glass manufacturing as of the

time of the hearing.[4] Based on the evidence presented at the hearing, the Administrative Law Judge found that such discoveries did not exist and concluded that all 18 placer mining claims were therefore invalid. Accordingly, he declared them null and void.

On appeal, appellants press the following arguments:

1) The contestants have no property interest adverse to the contestees', which adverse interest is a prerequisite to *standing* to initiate a private contest; the contestants only have a license from the United States to cross national forest land, subject to existing rights. Also, by way of preface, appellants reassert their objection to the entry by the United States as intervenor in these proceedings.

2) The rights of the contestees in each claim are private property rights of which they may not constitutionally be deprived by other private parties in an administrative proceeding.

3) The Administrative Law Judge erroneously assumed that the contestees in a private contest have the burden of proving the validity of their claims.

4) The contestants failed to establish by a preponderance of the evidence that the claims are invalid.

5) The Administrative Law Judge improperly denied the contestees' motion to reopen the hearing for the receipt of further evidence.

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[4]The Judge did not make any determination regarding the charge that the land was nonmineral in character. In his decision, at 2, he had the following to say:

> If there has been a discovery of a valuable mineral deposit, the land must necessarily be mineral in character. If there has not been such a discovery on a claim, the claim is void. Although each 10-acre subdivision must be mineral in character, the determination in this case will be based on the question of discovery not on the mineral character of the land. Accordingly, the third charge is dismissed.

In their initial argument on appeal, appellants maintain that the contestants' easement and special use permits are not interests "adverse" to the interests of appellants within the meaning of 43 CFR 4.450-1. Accordingly, they argue that the contestants lack standing to initiate a private contest. We do not agree. 43 CFR 4.450-1 reads as follows:

> *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

In *Duguid v. Best,* 291 F.2d 235 (9th Cir. 1961), *cert. denied,* 372 U.S. 906 (1963), the Court of Appeals held that pursuant to the above regulation[5] the holder of a special use permit granted by the Forest Service, Department of Agriculture, which permitted construction of a dam and spillway on national forest land, could initiate a private contest to determine the validity of a mining claim in conflict with the special use permit.[6] The facts in that case are

[5]With minor variation, the regulation was at that time codified at 43 CFR 221.51.

[6]*See also Thomas v. DeVilbiss,* 10 IBLA 56, 57 (1973), holding that the owner of a grazing lease under section 15 of the Taylor Grazing Act of 1934, *as amended,* 43 U.S.C. § 315 (1970), had a sufficient adverse interest under 43 CFR 4.450-1 to initiate a contest against a mining claimant alleging lack of discovery of valuable minerals; and *Sedgwick v. Callahan,* 9 IBLA 216, 223 (1973), holding that surface patentees under the Stock-Raising Homestead Act of 1916, *as amended,* 43 U.S.C. § 291 *et seq.* (1970), had an adverse interest sufficient to bring a private contest against mining claimants. *See also United States v. Howard,* 15 IBLA 139 (1974); *City of Phoenix v. Reeves,* 14 IBLA 315, 81 I.D. 65 (1974).

strikingly similar to the situation presented in this proceeding. In *Duguid,* the Paradise Irrigation District was granted a permit "subject to all valid claims." Subsequent to the grant of the permit, the District, without the consent of the mining claimants, took posession of a portion of the mining claim and proceeded to construct a dam and spillway thereon. The claimants then instituted an action against the District in the Superior Court of the State of California alleging unlawful taking of private property. Thereafter the District filed in the California Land Office, Bureau of Land Management, a complaint against the mining claimants as a private contest seeking an adjudication by the Bureau of the validity of the mining claim. The District's complaint alleged that its special use permit entitled it to use the lands specified in its permit, that the mining claimants were asserting an adverse claim, and that the lands within the mining claim were nonmineral in character and contained minerals insufficient to constitute a discovery. The Court of Appeals held that under such circumstances the initiation of a private contest by the District was proper.

[1] A similar conflict of interest exists in the present proceeding. To the extent that a multi-lane, major freeway and high-pressure pipelines cannot co-exist with the mining of sand and gravel and other minerals on the subject claims, the interests of the State and Calnev are clearly "adverse" to the interests of the appellants within the meaning of 43 CFR 4.450-1.[7] Appellees are entitled to bring an action in

[7]The record indicates that in 1960 appellant J. J. Schwietert, then owner of all 18 claims, executed a waiver of rights to surface use thereof (Exs. C, D, E) under the provisions of section 6 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 614 (1970). By such voluntary relinquishment, Mr. Schwietert gave the United States the right to manage and dispose of the vegetative surface resources on the claims and to manage other surface resources thereof. But as correctly pointed out by appellants, section 4 of the Act, 30 U.S.C. § 612 (1970), provides that,

(footnote continued on following page)

the Department to determine whether discoveries have been perfected on appellants' unpatented mining claims so that appellees may know the proper course to follow in protecting their interests in the land. Accordingly, we conclude that the appellees have standing to bring this private contest.

[2] Appellants further object to the United States Department of Agriculture intervening in the contest in the capacity of a contestant. Intervention was clearly proper as the Department of Agriculture was a party whose interests were affected by the proceeding. *See United States v. McCall,* 2 IBLA 64, 75, 78 I.D. 71 (1971). When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to properly administer them as the law directs. Accordingly, if the Department of Agriculture determines that it has an administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and that duty devolves upon this Department. *United States v. Bergdal,* 74 I.D. 245, 252 (1967); *H. H. Yard,* 38 L.D. 59, 66-67 (1909). The purpose of this private contest was to ascertain the validisty of mining claims lying in a national forest. The initiation of such a proceeding could have been recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the

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any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

Section 6 further provides that,

no such waiver or relinquishment shall be deemed in any manner to constitute any concession as to the date of priority of rights under said mining claim or as to the validity thereof.

Thus, the relinquishment of surface use under this Act has not removed the conflict between the parties.

Forest Service, effective May 3, 1957. VI BLM Manual 3.1 (June 21, 1962). Had such a separate proceeding been brought, it could have been consolidated with the private contest. *Marvel Mining Co. v. Sinclair Oil and Gas Co., United States v. Marvel Mining Co.,* 75 I.D. 407, 410 (1968). Whether done by consolidated proceedings or by intervention, the substance of the action is the same. Furthermore, the Government intervenor may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint. *Jebson v. Spencer,* 61 I.D. 157, 169 (1953). It was also proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service. *United States v. Ramsher Mining and Engineering Co.,* 14 IBLA 32, 36 (1973). *See also* 43 CFR 1862.4.

[3] Appellants' second allegation of error is also without merit. If an unpatented mining claim is invalid, compensation is not required because "no right arises from an invalid claim of any kind," and thus nothing is taken from the claimant. *Cameron v. United States,* 252 U.S. 450, 459-60 (1920). This is true whether the determination of invalidity is made in a proceeding initiated by the Government or by a private party. In either case the adjudication is made not by the party who initiates the proceedings, but by authorized representatives of the Department of the Interior. *See Duguid v. Best, supra* at 241. It has been argued before that such validity proceedings are unconstitutional administrative takings or condemnations of private property. The courts, however, have recognized that the Department of the Interior has plenary power in the administration of public lands, and as part of that power the Department has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims. *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334 (1963);

Cameron v. United States, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied,* 393 U.S. 1025 (1969); *Davis v. Nelson,* 329 F.2d 840 (9th Cir. 1964). *See also United States v. Howard,* 15 IBLA 139, 143 (1974); *United States v. Northwest Mine & Milling, Inc.,* 11 IBLA 271, 272-73 (1973); *United States v. Dummar,* 9 IBLA 308, 309 (1973).

In their third and fourth arguments, appellants generally maintain that the Administrative Law Judge's decision was incorrect as it was based on the improper assumption that the contestees had the burden of proving the validity of their claims. Appellants argue that the contestants were required and failed to prove by a preponderance of the evidence that the claims were invalid.

We note that while in a private contest the party bringing the action generally has the burden of preponderating on the disputed issue, *Marvel Mining Co. v. Sinclair Oil and Gas Co., supra* at 423, when the Government intervenes as a contestant the proceeding then becomes analogous to any other government contest where we have held that the contestant need only show a prima facie case of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that the claims are valid. *United States v. Clear Gravel Enterprises, Inc.,* 2 IBLA 285, 301 (1971); *see Foster v. Seaton,* 271 F.3d 836, 838 (D.C. Cir. 1959).

In any case, the issue is without consequence because regardless of which party the Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims. The thrust of contestants' evidence wholly negated the existence of a discovery on any of the claims. Thus, we find that the Judge's conclusion that the claims are invalid is supported by a preponderance of the evidence in the

record. As the appellants essentially contend that the Judge's decision is contrary to the evidence, we shall set forth the salient points adduced at the hearing.

The contestants' first witness was Austin Schroter, a consulting geologist and mining engineer with 35 years of experience in various positions in the mining industry (Tr. 76). Mr. Schroter made a mineral evaluation study of the claims to see if there were valuable minerals of any kind. During his examination he was aided by Dr. Robin Willis, an engineering and petroleum geologist, T. A. DeVore, a metallurgical engineer, Charles A. Lee, a geologist, John F. Schroter, an engineering technician, and Frank Nevin, an engineering geologist (Tr. 98).

In the spring of 1972, Schroter and his aides undertook a sampling program on each of the claims (Tr. 124-25). Samples were taken from each claim at an average depth of 10 to 12 feet. Each sample was then coned, quartered down and split into four sections. One quarter was screened and weighed on the ground to determine the sand to gravel ratio, a second quarter was submitted for laboratory analysis, the third quarter was retained for examination for precious metal content, and the last quarter was reserved for examination by interested parties, such as the contestees (Tr. 127).

In a laboratory analysis, Schroter tested the samples from the claims to determine their sand to gravel ratios, their resistance to abrasion (L. A. Rattler Test), and their sand and silt content (Sand Equivalent Test) (Tr. 135-36). The test results indicated that the material on the claims did not meet minimum specifications required for commercial aggregate in the industry as of July 23, 1955, or for any period thereafter (Tr. 135, 142, 147, Ex. 14a).

In addition to the sand and gravel study, the claims were examined for precious metals. Samples from each of the

claims were panned to a concentrate and no gold or silver was observed in particulate form (Tr. 147-48). The samples were also subjected to fire assay (Exs. 15a, 15b, 15c) and again the quantity of gold and silver did not approach commercial significance on any of the claims (Tr. 153, 264). Assays for precious metals were performed both by Mr. DeVore and by the Union Assay Office of Salt Lake City, Utah (Tr. 151, Exs. 14b, 14c, 14d). No metals of any value were found. Schroter testified that the claims were examined for any type of commercial mineral whatsoever: oil, gas, gold, silver, platinum, industrial minerals, feldspar, orlithium, zirconium, vanadium, etc., "any commercial mineral whatever, we looked for," (Tr. 222), but nothing of commercial value was discovered.

In addition to the mineral examination, Schroter did an extensive sand and gravel marketing study. He determined that the relevant trade territory extended to San Bernardino, 20 miles to the south, and Victorville, 20 miles to the north (Tr. 200-01). Schroter interviewed sand and gravel producers who were supplying this area and acquired information regarding the quality and quantity of the materials they produced both at the present time and at the time that common varieties of sand and gravel were withdrawn from location. He also received information regarding haulage rates, market prices, costs of production and the extent of demand for sand and gravel in the trade territory (Tr. 205-07).

Schroter determined from his investigation that except for State highway projects underway during 1953-55 and 1968-70, there were no major public projects under construction requiring significant amounts of aggregate within a reasonable distance from the subject claims (Tr. 221). During the periods of limited demand when no State highway construction occurred, local producers in San Bernardino and Victorville were supplying high quality sand and gravel for use in residential construction, streets and highways, manufacture of sewer pipe, manufacture of ready-mix concrete, and manufacture of transit mix concrete (Tr. 221).

The evidence presented at the hearing was inconclusive regarding whether material from the subject claims was suitable for use in the construction of the State highways. Schroter testified that he examined State highway records which indicated that the material in sections 14 and 23 was unsuitable for use as mineral aggregates for road construction (Tr. 161). The State records indicate that land outside of the area of the claims, in sections 13 and 23, was used as a borrow pit for embankment material and for other low-grade material requirements (Tr. 196-97). The appellants argued that the material on the claims was suitable for highway construction as the State had waived its specification requirements when marginal quality material was in close proximity to the highway project (Tr. 1223).

In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit (Tr. 224-26). Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone,

or in a sand and gravel operation combined with production of a valuable mineral byproduct (Tr. 225, 226, 231, 1267).

Contestants' second witness was George Thwing, Mr. M. Thwing received a degree in civil engineering in 1928, and worked in the mining industry until 1938 when he went into the sand and gravel business. He operated the Triangle Rock and Gravel Company in San Bernardino, which produced sand and gravel and ready-mix material (Tr. 324-25). In 1973 he retired from the company and is currently operating as a business consultant. He was retained by the contestants to make a study of and form an opinion on the probability of developing a profitable sand and gravel operation from the lands covered by the subject claims as of July 23, 1955 (Tr. 328). He examined Schroter's test results, investigated the quality of and supply and demand for sand and gravel in the market area, haulage rates, availability of water for processing, specifications for commercial aggregate, quality and quantity of material on the claims, and concluded that it would not have been feasible to put a commercial plant on the site and operate in the market that was existing in 1955, or thereafter (Tr. 330, 345-46, 362). He determined that the only possible use for the material on the claims would be for low-grade fill material (Tr. 380).

Contestants' final two witnesses were Edward J. Curtin and Robert E. Hove. Mr. Curtin has been in the sand and gravel business for 18 years and is presently employed as manager of technical services for Owl Rock Products Company. Prior to this job he was employed by Owl Service Rock Company in San Bernardino (Tr. 441-42). Curtin testified that contestee Richard Hutchinson approached Owl Service Rock Company in 1967 with an offer to use the sand and gravel on the subject claims for construction of aggregates to be used in connection with the upcoming bids for the Interstate 15 highway project (Tr. 445). Owl sampled

the area and then entered into an option agreement which for $1,000 granted the right to remove 500,000 tons of material at a rate of 9¢ per ton for the first 100,000 tons, and 8¢ per ton thereafter (Tr. 450). Owl solicited all the general contractors who were bidding on the job but was unsuccessful in securing a contract. Curtin testified that Owl was not interested in the material for anything other than the highway project, and thus chose not to exercise the option (Tr. 457). He also expressed the view that based on his experience in the industry, a commercial aggregate operation could not have been installed within the area of the subject claims as the quality of the material was poor and the market was adequately covered by other producers (Tr. 457-58).

Mr. Hove is the owner-operator of a ready-mix concrete and aggregate plant, Hi-Grade Materials Company, in Lucerne, California. He has been in operation since 1955 and Victorville is part of his marketing area (Tr. 472-73). He testified that in 1969 he was approached by contestee Hutchinson regarding development of aggregates on the subject claims. He sampled the area and had the samples sent to the CHJ Materials Laboratory, Inc., San Bernardino, for testing (Tr. 478). The test results indicated that the quality of the material was too poor for commercial production, and accordingly no agreement was executed (Tr. 482, Ex. 25).

For the appellants, both contestee Hutchinson and J. J. Schwietert testified that in their opinion the subject claims could be commercially exploited (Tr. 556-76, 1180-88). Schwietert testified that for a period of ten years he had been stockpiling material from the claims for the purpose of seeing what materials were on the claims and to sell such material if he could find a willing buyer (Tr. 570-72). He never analyzed the quality of the material nor did he sell

any of it, but he stated that he gave it away to friends for use as foundation material (Tr. 576). James Maxwell Muir, Jr., President of King Solomon Mining Corp., and a stockholder in Doria Mining and Engineering Corp., testified that in his opinion it would have been commercially feasible in 1955 to install a $1,200,000 mill producing 600 tons per day of aggregate material (Tr. 1061-65). He offered no market or cost analyses to justify why such a project would have been commercially feasible.

Shortly before the hearing, the Hazen Research Company, Golden, Colorado, a mining exploration and consulting organization, was retained by the contestees to investigate the claims to determine what minerals could be produced. The conclusion of the Hazen Report (Ex. B) is that sand and gravel on the claims can be used in aggregates and that feldspathic sand in the fines can be used in the manufacturing of glass. The Hazen Report was prepared by William T. Hamling, David D. Billings, and Ralph Paul Meyertons.

Hamling is a mining engineer employed by the Hazen Company. His assignment was simply to take samples from the claims; he did not analyze the material nor did he make any investigation as to its marketability (Tr. 540-41). From two of the claims, the Outlook and Old Sunny, Hamling removed large, 120-gallon samples of material. From the remaining 16 claims he took smaller, 5-gallon samples; in some instances these latter samples represented 3-foot deep streambed excavations. Hamling testified that the time allotted for sampling was not sufficient to allow drilling a hole on each claim, but he was of the opinion that such drilling was unnecessary as the material in the general area did not appear to vary greatly from one claim to the next (Tr. 530-31).

Billings is a self-employed glass technologist who was called in to work with the Hazen Company to determine if suitable feldspathic sand products could be extracted for use in the glass industry (Tr. 612-20). He examined {]1/4]} pound of material from the large samples (Tr. 760). Based on his examination, he was of the opinion that given a 60% recovery rate from the bank-run material, it would be feasible to produce feldspathic sands for use in the Los Angeles glass industry (Tr. 631-33).

On cross-examination, Billings' opinion as to the commercial feasibility of producing feldspathic sands became fraught with qualifications and contingencies. He noted that he had made no estimate of the cost of setting up a plant (Tr. 652), he had not considered the cost of stripping overburden (Tr. 795), nor the costs of disposing of waste (Tr. 794). He assumed an ample water supply (Tr. 655), and also assumed that the quality of the material did not differ at different depths (Tr. 767). He did not know whether there were ample reserves on the claims (Tr. 647).

He made two very significant qualifications for the purposes of this decision. First, he did not analyze any of the 16 small samples and thus could only speculate and draw inferences as to the feldspathic sand quality on 16 of the claims. In these instances he recommended further sampling and testing to determine the quantity and quality of feldspathic material (Tr. 775). On cross-examination he was asked:

> Q. Sir, as a glass technologist, would you consider a mere visual inspection of samples from a potential site sufficient to advise a client whether or not the material would be acceptable as a glass sands component in a glass batch operation?
>
> A. No.

(Tr. 696).

Second, he noted that the relevant glass sand market was being supplied by an operation at Mission Viejo near Capistrano and by an operation at Del Monte, California. The Mission Viejo mine, which at the time of the hearing was shut down for an indefinite period, served approximately 75% of the market (Tr. 803), and had estimated reserves for a 50-year period (Tr. 647). Billings testified that given the market situation, a successful glass sands operation was contingent upon getting long-term commitments from potential customers (Tr. 776). He recommended that before investing any money in such an operation, it would be advisable to determine when the Mission Viejo mine was going back into production (Tr. 637), and to have potential customers examine the material on the subject claims to see if it fit their particular needs (Tr. 630, 780). Neither the appellants nor the Hazen Company contacted any producers or users of feldspathic sand to determine whether the products from the subject claims could be marketed. Billings testified that a plant capable of processing 100 tons per day would have cost $250,000 to $350,000 in 1955 (Tr. 662). James Maxwell Muir, Jr. placed the cost of a plant at $2,000 per ton in 1955 and $3,000 per ton in 1973, or $1,200,000 and $1,800,000, respectively, for a 600 ton per day plant (Tr. 1061, 1064). Schroter testified that a 100 ton per day plant producing both sand and gravel and feldspathic sand would cost $850,000 (Tr. 1284).

Meyertons is a mining and metallurgical engineer employed by the Hazen Company (Tr. 816). Meyertons testified that he visually examined the 16 small samples and was satisfied that the mineral content would be reasonably the same from sample to sample (Tr. 846). He did note, however, that had there been more time he would have further analyzed the 16 small samples (Tr. 859). Following an initial analysis of the two larger samples, Meyertons

decided to abandon the search for gold, silver and other precious metals (Tr. 882), and limit the examination to feldspar products (Tr. 883). Meyertons sent a portion of the large samples to Pacific Materials Laboratory, Inc., Bloomington, California, for an evaluation of the suitability of the material for use as an aggregate (Tr. 829). The test results indicated that the material was of poor quality (Ex. 27).

Meyertons testified that the Hazen Report showed that the feldspathic sand found in the samples tested was of sufficient quality to be used in the glass industry. He noted, however, that the potential inaccuracy in the total feldspar determination could be as much as 20% on the samples tested (Tr. 938), and that additional variances could occur with respect to the 16 untested samples. Accordingly, he recommended additional sampling and testing of the materials on the claims (Tr. 859, 945-46). A flow sheet was developed to show in a preliminary fashion how products could be produced in a sand and gravel and glass sand operation (Tr. 836). The report was in essence a technical feasibility study, not a marketability study.

Appellants' last witness was J. Mark Longfield. Mr. Longfield is a consultant for construction aggregate businesses and has been involved in the sand and gravel industry since 1964 (Tr. 1219). His opinion was limited to the marketability of sand and gravel only. Longfield viewed the claims and in his opinion the material thereon was "marginal" (Tr. 1222). After studying the relevant market he testified that aside from the highway projects, very little demand existed in the Victorville area until 1965, and while there was some activity in the Hesperia-Apple Valley area, this was adequately covered by local producers (Tr. 1238). He also testified that appellants could not compete in the San Bernardino area because the rock being supplied there was of superior quality. Based on these factors he concluded

that a sand and gravel operation could not have been profitable either in 1955 or at any time up to the hearing (Tr. 1241). He did testify, however, that an operation might be successful if a co-product was produced in conjunction with sand and gravel (Tr. 1241). He was not an expert, however, with regard to the production of feldspathic sand and stated that he had no opinion as to whether in 1955 a sand and gravel and feldspathic sand operation could have produced and sold material at a profit (Tr. 1251).

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *

Castle v. Womble, 19 L.D. 455, 457 (1894); *United States v. Coleman,* 390 U.S. 599 (1968). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra.* This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims. *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969); *Foster v. Seaton, supra.*

[4] The parties to this proceeding stipulated that the sand and gravel on the claims was to be treated as a common

variety material located prior to the withdrawal of such materials (Tr. 144-45). Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. §611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *United States v. Barrows,* 404 F.2d 749 (9th Cir. 1968), *cert. denied,* 394 U.S. 974 (1969); *Palmer v. Dredge Corp., supra; United States v. Clear Gravel Enterprises, Inc., supra.* This entails a showing of the market which then existed, the cost of extraction and processing which would have been incurred, the transportation charges which would have been involved, the unit price which then prevailed and the profit which the claimants might have realized if they had elected to proceed at that time. *United States v. Gibbs,* 13 IBLA 382, 391 (1973).

The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market from the period 1955 to the hearing. During that period deposits of superior quality were being actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. *Barrows v. Hickel,* 447 F.2d 80, 83 (9th Cir. 1971). It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a

man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. *Barrows v. Hickel, supra.*

The above finding disposes of the contestees' assertion that the Calnev and State rights-of-way are in derogation of their mining claims. The rights-of-way were granted in 1961, 1968 and 1970. Since the mining claims during those periods (and beyond) were at most valuable only for sand and gravel, the finding that the claims were invalid as sand and gravel claims as of the dates when the rights-of-way issued requires a conclusion that the claims, even if later validated, would be subject to the rights-of-way and not vice versa as the contestees contend.

[5] The land, however, remained open to mineral location subject to the rights-of-way. *See A. W. Schunk,* 16 IBLA 191, 195 (1974); *Solicitor's Opinion,* 67 I.D. 225, 228 (1960). Therefore, we must examine whether a discovery after 1970 validated the claims. The only valuable mineral suggested by the record is the possibility of a discovery of feldspathic sands suitable for making glass. For this purpose we assume that sands suitable for glassmaking are not a common variety material. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 305-08, 80 I.D. 538, 549 (1973); *United States v. Pierce,* 75 I.D. 270, 281 (1968). Two requirements of law dispose of this issue. First, where mining claimants are seeking to validate a group of claims, they must show that a valuable mineral deposit exists on each claim. A showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. *United States v. Colonna and Company of Colorado, Inc.*, 14 IBLA 220, 226 (1974); *United States v. Harper,* 8 IBLA 357, 368 (1972). Here, only material from two of the claims was actually analyzed by the Hazen Company. Appellants' experts admitted that variations in the quality and quantity of feldspathic sands could occur on the remaining 16 claims.

It is axiomatic, we believe, that prudent men do not invest their money in attempting to develop a mine without some evidence that the mineral which they seek to exploit exists in such quality and quantity as to permit the recovery of their capital outlay with a profit. Accordingly, it was proper to conclude that the 16 unanalyzed claims were not shown to have discovery of a valuable deposit of feldspathic sands.

[6] Second, the Department recognizes a distinct difference between *exploration* and *discovery* under the mining laws. Exploratory work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those minerals exist in such quantity and quality that there is a reasonable prospect of success in developing a paying mine. Only when the exploratory work shows such a reasonable prospect of success can it be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Converse,* 72 I.D. 141, 149 (1965), *aff'd, Converse v. Udall,* 399 F.2d 616 (9th Cir. 1968), *cert. denied,* 393 U.S. 1025 (1969). In this proceeding, all of appellants' experts testified that their examinations were preliminary and that further testing would have to be accomplished before recommending that production occur on any of the claims. Appellants were thus still at the exploratory stage. We note again that appellants had not yet reached the stage of developing an analysis of the marketability of the feldspathic sands on the claims. As Administrative Law Judge Holt said in his decision (at 8):

> The Hazen report is based on a chemical analysis of one sample from one claim and a visual examination

of samples from each of the other claims. The flow sheet and plan of operation require the utilization of the sand and gravel for all purposes. Since the Department has held that the common variety materials can not be used, it is only the feldspathic sand that is subject to location. There was no evidence that this latter material could be economically utilized by itself and no attempt has been made to determine whether it could compete in the existing market. No prudent man would invest his time and means developing any one of the claims until the technology of processing the feldspathic sand has been completed and a reasonably accurate estimation has been made of the cost of production. Until this has been completed there is no way of determining whether the material could compete in the existing market.

[7] There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found within the limits of the claims, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing the property. *United States v. Duval,* 1 IBLA 103 (1970), *aff'd Duval v. Morton,* No. 72-2839 (9th Cir. December 19, 1973), *aff'g Duval v. Morton,* 347 F. Supp. 501 (D. Ore. 1972). Accordingly, we conclude that all of the claims were properly declared null and void.[8]

[8]In their brief on appeal, appellants place great reliance on *United States v. Kosanke Sand Corp.,* 3 IBLA 189 (1971), which upheld the validity of claims located for feldspathic sands. That decision was later set aside and remanded by this Board. *United States v. Kosanke Sand Corp.,* 12 IBLA 282, 80 I.D. 535 (1973). The facts in the *Kosanke* proceeding are clearly distinguishable from the ones at hand. In *Kosanke,* the exploration of the claims, technique for processing of the sand, existence of a possible market, suitability of the sand for use in glassmaking, all had progressed much further than in this case, yet *Kosanke* was remanded for a hearing to develop further evidence as to the quality and quantity of the silica sand on each claim, the amount of each grade of sand on each claim, the market for each grade, the proposed flotation process for beneficiating the silica sand, and transportation costs. The evidence in this case falls so far short of that offered in *Kosanke* as to leave no doubt that the validity of the claims has not been established.

[8] In their final argument on appeal, appellants charge that the Administrative Law Judge improperly denied their motion to reopen the proceedings for the purpose of introducing new evidence. Appellants allege that they have evidence that will establish the fact that the State of California and its contractors used substantial quantities of sand and gravel from appellants' claims during the course of the construction of the highway projects in 1954-55 and 1968-70. In denying the motion, Judge Holt stated the following:

> In the recent decision of *United States v. A.E. Kottinger, et al.,* 14 IBLA 10 (November 27, 1973), the Board held (syllabus):
>
> > Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show a discovery.
>
> This ruling was supported by both administrative and judicial decisions.[9]

[9]In *Kottinger, supra* at 13, we quoted the following from *United States v. Charleston Stone Products,* 9 IBLA 94, 100 (1973):

> [T]he contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the * * * mineral has continued without any prolonged interruption * * *. [I]f the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost * * *. *United States v. Estate of Alvis F. Denison,* 76 I.D. 223 (1969); *Mulkern v. Hammit,* 326 F.2d 896 (9th Cir. 1964). [L]ater recovery of a profitable market cannot serve to resuscitate such invalid claims.

Judicial review of the *Charleston* case has been sought, *Charleston Stone Products Co., Inc. v. Morton,* Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada. *See also United States v. Johnson,* 16 IBLA 234 (1974); *United States v. Winegar,* 16 IBLA 112, 81 I.D. 370 (1974).

Under the *Kottinger* decision it was incumbent on the contestees to establish that there was a "reasonably continuous profitable market" for the sand and gravel on the claims from 1955 to 1972. Assuming that there was a profitable market for the sand and gravel on one or more of the claims for the periods 1954-1955, and 1968-1970, the gap between 1955 and 1968 is fatal to the contestees' contention of validity.

Accordingly, the motion to reopen the hearing is denied.

For the reasons stated, the Judge was correct in denying appellants' motion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

/s/ Martin Ritvo
Martin Ritvo
Administrative Judge.

We concur:

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

APPENDIX A

	Name	*Date of Location*	*Legal Description*
1)	Sand Bank	March 1, 1953	NW ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
2)	Harbor	March 1, 1953	SW ¼ of NW ¼ Sec. 14, T. 3 N., R. 6 W., SBM
3)	Many Stones	March 1, 1953	NW ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
4)	Wild Trail	March 1, 1953	SW ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
5)	Buck Shot	March 1, 1953	NE ¼ of SW ¼ Sec. 14, T. 3. N., R. 6 W., SBM
6)	Old Sunny	March 1, 1953	SE ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
7)	Outlook	January 5, 1955	NE ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
8)	Delight	January 5, 1955	NW ¼ of NE ¼ Sec. 14, T. 3 N., R. 6 W., SBM
9)	Sunshine	January 5, 1955	NE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
10)	Baldy	January 5, 1955	SE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
11)	Hawk	January 5, 1955	SE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
12)	Old Blister	March 1, 1953	NE ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
13)	Clear View	March 1, 1953	SW ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
14)	Buster	March 1, 1953	SE ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
15)	Lizard Gulch	July 12, 1955	NE ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM
16)	Mesquite	July 12, 1955	NW ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM
17)	Barren	July 12, 1955	SW ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
18)	Rattler	July 12, 1955	SE ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM

APPENDIX "D".

28 U.S.C. § 1331(a).

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

. . . ."

APPENDIX "E".

30 U.S.C. § 22.

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

30 U.S.C. § 35.

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands. . . ."

30 U.S.C. § 611.

SUBCHAPTER II. — MINING LOCATIONS

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used

in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called ''block pumice'' which occurs in nature in pieces having one dimension of two inches or more. 'Petrified wood' as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.''

APPENDIX ''F''.

5 U.S.C. § 706.

''To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.''